

82-1997
NO. _____

Office - Supreme Court, U.S.

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CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

DENNIS ALBERT ROLLINS, JUNIOR
N. ENFINGER, AND JOHN D. THOMAS,
PETITIONERS,

V.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES SUPREME COURT

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QUESTION PRESENTED FOR REVIEW

I Whether the trial court's refusal to disclose the identity of the unnamed officer who actually received the confidential informant's tip violated the Petitioners' Sixth Amendment right to confrontation of witnesses.

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REFERENCE TO THE OPINION BELOW

The conviction of Petitioners, Dennis Albert Rollins, Junior N. Enfinger and John D. Thomas, in the United States District Court for the Middle District of Alabama, was affirmed by the United States Court of Appeals, Eleventh Circuit, in an opinion filed on 3 March 1983.

On 22 March 1983, a Petition for Rehearing was timely filed with the Clerk of the Eleventh Circuit, but said Petition was denied on 15 April 1983.

JURISDICTION

The March 3, 1983, opinion of the Court of Appeals for the Eleventh Circuit upheld the district court's denial of Petitioners' motion to require the Government to disclose the name of the officer who gave the information received from the confidential informant to Lt. Bradford of the Alabama Department of Public Safety, Narcotics Division. Said information led to the arrests of the Petitioners here.

The Petitioners were subsequently convicted and filed their petition for rehearing in a timely fashion. That petition was denied on 15 April 1983.

The Jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense. (emphasis added)

STATEMENT OF THE CASE

On January 26, 1982, Lieutenant Bradford of the Alabama Department of Public Safety, Bureau of Investigations, Narcotics Division, received a call from an unnamed law enforcement

officer who related certain information about a suspected pending exchange involving illicit narcotics. The unnamed officer gave the source of his information as being a confidential informant. (R. Vol. 2, P. 119-120)¹

The trial court denied Petitioners' (Appellants at the Court of Appeals level) motion to require the Government to disclose the name of the officer who gave Lt. Bradford the information which led to the arrest of each petitioner. The trial court's denial was affirmed by the Eleventh Circuit. U.S. v. Rollins, 699 F.2d at 534 (11th Cir. 1983).

Petitioners filed a Petition for Rehearing on 22 March 1983, based in part on the Eleventh Circuit's denial of their motion to disclose the identity of the unnamed officer. The Petition for Rehearing was denied on 15 April 1983.

1/ References to the Record of the District Court proceedings are by volume and page number.

ARGUMENT

I THE TRIAL COURT'S REFUSAL TO DISCLOSE IDENTITY OF THE UNNAMED OFFICER WHO ACTUALLY RECEIVED THE CONFIDENTIAL INFORMANT'S TIP VIOLATED PETITIONERS' SIXTH AMENDMENT RIGHT TO CONFRONTATION OF WITNESSES

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense. (emphasis added)
United States Constitution, Amendment VI

Confrontation of witnesses has long been guaranteed by the Constitution of the United States of America and upheld as a fundamental right of all persons. The right to confrontation has also been made obligatory on the several states as essential to a fair trial by the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965); McCray v. Illinois, 386 U.S. 300, 87 S.Ct. 1056, 18 L.Ed.2d 62 (1967). A major reason underlying

the constitutional confrontation rule is to give a defendant charged with a crime an opportunity to cross-examine the witnesses being used in the prosecution against him. Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965).

This Court, in Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), has indicated that a confidential informant's identity need not always be revealed, thus carving out an exception to the Sixth Amendment right. The Fifth Circuit, in United States v. Drew, 436 F.2d 529 (5th Cir. 1970), followed the Aguilar decision with the explanation that confidentiality is necessary in light of the informant's precarious position in the scheme of things. Id at 534 - 535. Petitioners realize the Government's interest in protecting the safety and usefulness of its informants and do not object to the non-disclosure of the informant's name in the present case.

The present fact situation differs from the

Aguilar and Drew cases in that not only did the Government refuse to disclose the name of the informant, they also refused to disclose the name of the law enforcement official who received the tip from the informant and passed it on to Lt. Bradford of the Alabama Department of Public Safety, Narcotics Division. (R. Vol. 2, P. 120 - 121). By upholding the District Court's decision, the Eleventh Circuit has sanctioned a substantial departure from a common and accepted practice, i.e., protecting the confidentiality of a government informant.

It is clear from all of the evidence received at trial, and at no point contradicted by the Government, that the investigation and surveillance of the Petitioners which ultimately culminated in their arrest, was initiated as a result of the informant's tip to the unnamed officer. The information given by that informant, and the reliability of said informant, was the most crucial element of the Government's case against the Petitioners, yet

the Petitioners had no opportunity whatsoever to confront or cross-examine any person who had first-hand knowledge of the information or the reliability of the informant.

In situations where a court decides that it is in the best interests of the informant to prevent disclosure of his or her name, a defendant's only opportunity to defend himself against statements or information given by the informant is to question the next best source, i.e., the officer who had contact with the informant. While this substitution of parties is inherently less satisfactory or beneficial to the defendant, it at least affords the defendant some opportunity to put forth a defense in his behalf by attacking the informant's reliability or information through his law enforcement contact. By extending this protection to the informant's law enforcement contact, Petitioners have no way of inquiring into the informant's past track record or basis for believing that the Petitioners were going to engage in some

sort of criminal activity. Generally, in situations involving any kind of a drug transaction the presence or absence of probable cause to arrest is the key issue in the prosecution of a defendant. Where an informant is involved, a probable cause determination usually succeeds or fails based on the reliability of that informant. Petitioners were prevented from cross-examination of the one officer who could testify as to the reliability of the confidential informant.

The United States District Court for the Middle District of Alabama, and the Eleventh Circuit through its affirmance, have sent the Petitioners to trial with both hands tied behind their backs. Citing Drew, the Eleventh Circuit noted that the name of an informant not involved in the transaction need not be revealed. But that Court went further than Drew and Aguilar by ruling that the identity of the unnamed law enforcement officer need not be disclosed either, such disclosure serving no use-

ful purpose other than possibly leading to the discovery of the confidential informant.

In doing so, the Court of Appeals has erroneously failed to balance the interests of the Petitioners against those of the informant. Since the Aguilar decision, the state and federal courts have encountered a multitude of cases involving an unnamed informant and a named officer of the law who serves as his contact. After extensive research, Petitioners are unable to find any other case whereby a court rules that non-disclosure of a law enforcement contact is necessary to preserve the identity of an informant. Any further jeopardy an informant would be placed in by disclosure of the officer would necessarily have to result from negligence committed by that officer, and not from the mere disclosure of the officer's name. Testimony by officers in similar situations is standard procedure in criminal prosecutions, yet the District Court and the Eleventh Circuit, by their decision in this

case, have both apparently decided that disclosure of law enforcement contacts will place an informant's life or usefulness in jeopardy. The prejudice to the Petitioners in defending their case substantially outweighed any reasons the Government offered, or could have offered, as justification for the nondisclosure of the officer's name.

The Petitioners were confronted with a double hearsay situation, i.e., information given by one unnamed source to another unnamed individual and then to a known officer with the Alabama Department of Public Safety. The inherent unreliability of hearsay has been the subject of many treatises, but any prejudice to the defendant can be avoided for the most part by effective cross-examination of the declarant. The Petitioners in the case sub judice were effectively prevented from attacking the reliability of the information or the credibility of the informant who gave such information.

The Eleventh Circuit, by refusing to reverse the ruling of the district court below, has erroneously overlooked, or failed to consider the Petitioners Sixth Amendment right to be confronted by witnesses against them, and consequently have been deprived of their Fifth Amendment right to due process and a fair trial.

Accordingly, the Petitioners respectfully request this Honorable Court to grant their Petition for Writ of Certiorari and afford said Petitioners an opportunity to file a brief on the merits of their argument as set forth above.

CONCLUSION

Petitioners were arrested and convicted based on information supplied by a confidential informant, received by an unknown officer of the law, and then furnished to a known officer with the Alabama Department of Public Safety, Narcotics Division.

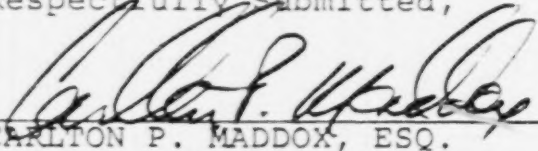
Refusal to disclose the name of the officer who actually received the tip from the informant prohibited the Petitioners from exercising their Sixth Amendment right to confront witnesses.

The prejudice to the Petitioners in defending their case substantially outweighed any reasons the Court might have had in refusing to overrule the trial court's decision that the identity of the unnamed officer need not be revealed. The Petitioners respectfully request this Court to exercise its power of supervision and overturn this substantial departure from accepted practice which so flagrantly infringes on their Sixth

Amendment rights.

The Petitioners urge this Court to grant their Petition for Writ of Certiorari, so that they might receive their guaranteed right to a fair trial.

Respectfully Submitted,



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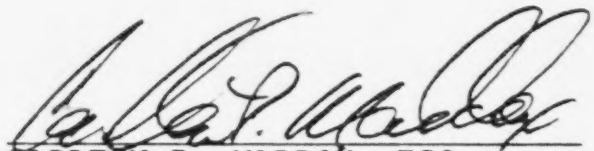
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to The Honorable John Bell, United States Attorney, Federal Building, P. O. Box 711, Lee and Church Streets, Montgomery, Alabama, 36101, and Charles R. Niven, Assistant United States Attorney, P. O. Box 197, Montgomery, Alabama, 36101, by U. S. Mail, this 19th day of May, 1983.

A handwritten signature in cursive script, appearing to read "Carlton P. Maddox", written over a horizontal line.

CARLTON P. MADDOX, ESQ.
(Counsel of Record)

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

DENNIS ALBERT ROLLINS, JUNIOR
N. ENFINGER, AND JOHN D. THOMAS,
PETITIONERS,
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APPENDIX FOR WRIT OF CERTIORARI TO
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436 F.2d 529 (5th Cir. 1970)

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UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
NO. 82-7159

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DENNIS ALBERT ROLLINS, JUNIOR
N. ENFINGER, AND JOHN D. THOMAS,

Defendants-Appellants.

Appeals from the United States District
Court for the Middle District of Alabama.
March 3, 1983.

BEFORE: HILL and ANDERSON, Circuit Judges,
and LYNNE, District Judge (Honorable
Seybourn H. Lynne, U.S. District
Judge for the Northern District of
Alabama),

JAMES C. HILL, Circuit Judge:

On February 23, 1982, appellants Dennis Rollins, Junior N. Enfinger and John D. Thomas were indicted for conspiracy to possess cocaine with the intent to distribute, in violation of 21 U.S.C. §846. Appellants Rollins and Thomas were indicted in an additional count for knowingly, intentionally and unlawfully possessing cocaine with intent to distribute, in violation

of 21 U.S.C. §841(a)(1). In a separate count, appellant Enfinger was also indicted for knowingly possessing cocaine with the intent to distribute. Each appellant pled not guilty and subsequently filed motions to suppress the evidence based on alleged violations of their fourth amendment rights involving search and seizure. Following a suppression hearing, all motions were denied. Appellants then withdrew their motions for a jury trial and the case was submitted to the trial judge on an oral stipulation of facts. The court found each appellant guilty on all counts charged in the indictment. Appellants subsequently filed timely notices of appeal.

FACTS

On January 26, 1982, Lt. Bradford, an agent for the Alabama Department of Public Safety, Narcotics Division, received a call from an unnamed law enforcement officer who related a tip from an unnamed informant. The tip included the following information: On

January 26, 1982, a blue and white Piper Warrior, Tail No. 30361, would be on the ground in Panama City but would leave to fly to Dothan or some other point in Alabama. There would probably be two occupants in the plane, one of whom would be named Thomas. The plane would be carrying approximately one pound of cocaine. The unnamed law enforcement officer told Lt. Bradford that the source of this information was an informant who had provided reliable information in the past.

Early in the afternoon of January 26, 1982, Lt. Bradford called officer Rhegness in Montgomery, Alabama, relaying the informant's tip and dispatching the officer, by plane, to Panama City to establish surveillance. Officer Rhegness and two other officers found the described plane unoccupied, in Panama City. At approximately 4:30 p.m., one of the officers observed two men (later identified as appellants Rollins and Thomas) exit a late model Chevrolet and board the plane. One of the

officers took down the license tag number of the car to identify the owner. The plane took off and first headed north, then turned east, then dropped altitude and proceeded north again, heading toward Dothan. Officer Rhegness and the other officers took off in their plane to follow. While enroute, Lt. Bradford notified the appropriate authorities including an Officer White, of the potential drug deal in Dothan.

The car the two subjects had driven to the Panama City airport was registered to All-American Car Rentals, who had previously sold the car to J. C. Elmore. Officer White informed Lt. Bradford that they previously had been involved in a narcotics investigation in which J. C. Elmore, Jr., was a suspect and that Elmore, Jr., was a convicted marijuana trafficker. Lt. Bradford then requested Officer White to set up a ground surveillance at the Dothan Airport.

The Piper Warrior landed and taxied to a

stop about fifty yards from where Officer White and other agents were parked. Officer White observed the two suspects leave the plane carrying a brown satchel case and a paper bag. The suspects walked over and entered an unoccupied 1975 Ford. A few minutes later a man, recognized by Officer White as Junior Enfinger, walked from a nearby office building and entered the same car. Officer White recognized Enfinger because he was a convicted drug trafficker. The three parties remained in the car for approximately 15 minutes. The two men from the plane then left the car and returned to the plane. Enfinger drove away in the car, followed by a police car. The other two suspects boarded the plane and prepared for flight. At this point Officer Rhegness and others approached the plane, identified themselves and requested the suspects to deplane. Following standard procedure, Officer Rhegness then crawled up onto the wing to see if there were any other suspects in the plane. While

he was looking through the window, he noticed an open paper bag on the floor behind the back seat. Officer Rhegness observed a plastic bag the size of a baseball containing a white powder which he suspected was cocaine inside the paper bag. He then entered the plane to get a closer look at the contents of the paper thereby satisfying himself that the bag did, in fact, contain cocaine.

During this time period, the other officers followed Enfinger and stopped Enfinger's car. The officers requested Enfinger to exit the vehicle, informed him that he was a suspect in a possible drug transaction and read him his Miranda rights. The officers returned with Enfinger to the plane and all three suspects were arrested and read their rights.

Officer Rhegness proceeded to get a search warrant to search the remainder of the plane. Enfinger's car was driven to the police station and locked up. While the car was at the jail, Deputy Grant checked the car to ascertain its

vehicle identification number in order to prepare a search warrant affidavit. While checking the dashboard for the ID number, the deputy saw a clear package containing a white substance on the floorboard. The Deputy included this information in the affidavit and subsequently obtained a search warrant. It was discovered that the bag in the car did contain cocaine.

I.

Appellants Rollins and Thomas contend that the warrantless search of the plane violated their fourth amendment rights. On appeal, they seek reversal of the trial court's denial of their motions to suppress the evidence found on the plane.

(a) Probable Cause to Arrest

(1,2) A warrantless search of an airplane must be predicated on probable cause. The general standard to establish probable cause is if the facts and circumstances known to the arresting official are sufficient to warrant a

person of reasonable caution to have a belief that a suspect has committed a crime. United States v. Long, 674 F.2d 848 (11th Cir. 1982); United States v. McCulley, 678 F.2d 346 (11th Cir. 1982).

After reviewing the entire record¹ we conclude that the information contained in the informant's tip combined with subsequent verification of that information, the erratic flight path and altitude changes of the plane, the recognition of one of the suspects as being a known drug trafficker and the identification of the car owner as a known drug trafficker, provided sufficient information to create a showing of probable cause to arrest. Appellants

1. Included in the record was a video tape of the Officers search of the plane after they obtained a warrant. The Court has reviewed this tape and we found no merit to appellant's suggestion that the paper bag containing the cocaine was closed. Rather, the tape suggests that the bag was open, thereby corroborating Officer Rhegness' testimony that the bag was open and the cocaine was in plain view when he looked through the window of the plane.

argue, however, that the tip was unsupported by any indicia of the informant's reliability. It is true that the name of the informant and the law officer who passed the tip to Lt. Bradford were never exposed at trial. However, albeit hearsay, Lt. Bradford testified that the law enforcement officer stated to him that this informant had been known to provide reliable information in the past.

The standard for establishing probable cause based on the hearsay evidence of an informant's tip is most clearly found in two Supreme Court cases. In Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), the Court established a two prong test which must be met when probable cause is based upon information provided by an unidentified informant:

The magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, was "credible" or his information "reliable."

Id. at 112, 84 S.Ct. at 1512. However, five years later the Court held, in Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969),

(i)n the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip described the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation.

Id. at 416, 89 S.Ct. at 589. In this instance, the tip, in and of itself, was not sufficient to establish probable cause. However, the information in the tip was sufficiently detailed to alert suspicion. Lt. Bradford dispatched the agents to verify the information given. Not only was all the information verified by independent investigation, but further information was also gathered. The officers knew, that the car driven to the Panama City airport by appellants Thomas and Rollins was owned by a known drug trafficker. Officer White recognized

appellant Enfinger as being a drug trafficker. Finally, Officer Rhegness observed the unusual and furtive movements of appellants' plane after take off from Panama City. Its movements were inappropriate to a flight from point of departure to destination but were indicative of a desire to mislead an observer as to the plane's destination.

The Supreme Court in Draper v. United States, 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327 (1959), recognized the principle that probable cause may be established based upon an informant's tip if there is sufficient corroboration of the details of the tip as to insure reliability. The Fifth Circuit, in United States v. Horton, 488 F.2d 374 (5th Cir. 1973), presented an analogous situation to the case at bar. In Horton, an anonymous tip indicating that two men would be in a car carrying heroin was reported to a police officer. The police verified the information in the tip and discovered, along the way, further information.

The court, in upholding a finding of probable cause stated:

In addition to the investigating officer's observations that corroborated the specific details of the informer's report, the customs agents observed other circumstances indicating possible criminal conduct. During the surveillance previously described, the agents observed that the suspects were simply not conducting themselves in the manner of typical tourists or businessmen.

Id. at 379.

(3) Although it is clear that an uncorroborated anonymous tip is not sufficient to establish probable cause, nevertheless, when, as in this case, the information is sufficiently detailed as to remove suspicion of rumor or revenge; and that information is verified through independent investigation; and the cumulative effect of all information gathered meets the standard set forth in Aguilar, probable cause is established. Based upon all the evidence gathered in this case, we conclude there existed sufficient information to establish

probable cause.²

(b) The Search of the Plane

Appellants assert that even if probable cause existed, the warrantless search of the plane still violated the fourth amendment because the search was beyond that which is permitted as a search incident to an arrest. Appellants further contend that the search was not valid under the automobile exception.

(4) Because the search was based on a legal arrest supported by probable cause, as articulated in Part I (a) supra, we conclude that the search was within the bounds of both "search incident to an arrest" and the "automobile exception." See United States v. Ross, ----U.S.----, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982), New York v. Belton, 453 U.S.454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981). Although these cases may involve automobiles rather than

2. Appellant Enfinger suggests that the search, with a warrant, of his car was not valid due to lack of probable cause to arrest. Because we conclude that probable cause did exist, Enfinger's argument is without merit.

airplanes this court can see no difference between the exigent circumstances of a car and an airplane. Further, this circuit has previously expanded the automobile exception to include airplanes in the unpublished opinion of the United States v. Olson, 670 F.2d 185 (11th Cir. 1982).

II.

(5) Appellants also contend that the trial court erroneously denied their motion to require the Government to disclose the name of the officer who gave Lt. Bradford the information which led to their arrests. This court has concluded that the informant's tip was reliable and that there was sufficient corroboration to establish the credibility of the information.

The Supreme Court in Aguilar v. Texas, made it clear that an informant's identity does not have to be established. This circuit has also recognized that where the informant is not involved in the transaction, his or her identity need not be disclosed. United States

v. Drew, 436 F.2d 529 (5th Cir. 1970). Re-
leasing the name of law enforcement officer who
received the tip would serve no purpose other
than possibly to lead to the discovery of the
informant's identity.

III.

(6) Appellant Rollins contends his con-
viction can not be sustained due to insufficient
evidence because he was only a passenger in the
plane. The Government introduced evidence show-
ing that Rollins' fingerprints were found on a
box labeled "Snow Toker Free Base Kit." His
prints were also inside the bag of cocaine
which was found on the plane, as well as on a
set of scales. Moreover, there was evidence
showing that the cocaine found in appellant
Enfinger's car was part of the same batch of
cocaine found on the plane. There was ample
evidence to support Rollins' conviction.

Because we find no error by the district
court, we

AFFIRM.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 82-7159

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DENNIS ALBERT ROLLINS,
JUNIOR N. ENFINGER, and
JOHN D. THOMAS,

Defendants-Appellants.

Appeal from the United States District Court
for the Middle District of Alabama

ON PETITION FOR REHEARING

(APRIL 15, 1983)

Before HILL and ANDERSON, Circuit Judges and
LYNNE, District Judge.

PER CURIAM:

IT IS ORDERED that the petition for re-
hearing filed in the above entitled and num-
bered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/James C. Hill
United States Circuit Judge

Filed in U. S. Court of Appeals
April 15, 1983, Norman E. Zoller, Clerk

Appendix B-1

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 82-7159

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DENNIS ALBERT ROLLINS,
JUNIOR N. ENFINGER and
JOHN D. THOMAS,

Defendants-Appellants.

Appeal from the United States District Court
for the Middle District of Alabama

O R D E R:

The Motion of DENNIS ALBERT ROLLINS, JUNIOR
N. ENFINGER and JOHN D. THOMAS, for stay and
stay of the issuance of the mandate pending
petition for writ of certiorari is DENIED.

/s/James C. Hill

UNITED STATES CIRCUIT JUDGE

Filed U.S. Court of Appeals Eleventh Circuit
April 27, 1983
Norman E. Zoller, Clerk

UNITED STATES COURT OF APPEALS

ELEVENTH CIRCUIT

NO. 82-7159

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DENNIS ALBERT ROLLINS, JUNIOR
N. ENFINGER, AND JOHN D. THOMAS,

Defendants-Appellants.

United States Court of Appeals,

Eleventh Circuit
March 3, 1983.

Defendants were convicted in the United States District Court for the Middle District of Alabama, Truman M. Hobbs, J., of conspiracy to possess cocaine with intent to distribute and other crimes, and they appealed. The Court of Appeals, James C. Hill, Circuit Judge, held that: (1) there was probable cause to arrest; (2) because search was based on legal arrest supported by probable cause, search was within bounds of incident to arrest and automobile exception; and (3) evidence was sufficient to

Appendix D-1

support conviction of defendant who was passenger in plane wherein cocaine was found.

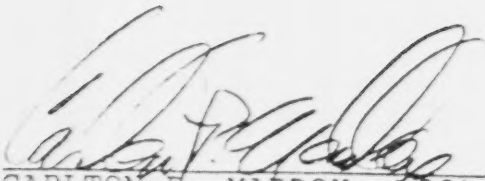
Affirmed.

NO. _____

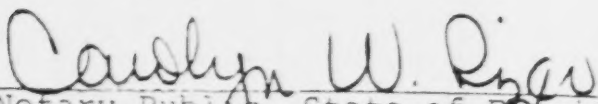
RESPONDENT.

- 1 -

this 1st day of June, 1983.


CARLTON P. MADDOX, Affiant

SWORN to and subscribed
before me this 1st day
of June, 1983.


Notary Public, State of Florida

My Commission Expires: NOTARY PUBLIC, STATE OF FLORIDA
My Commission Expires Mar. 29, 1987
Bonded By Transamerica Insurance Co.

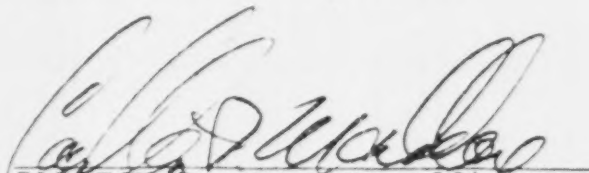
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RESPONDENT.

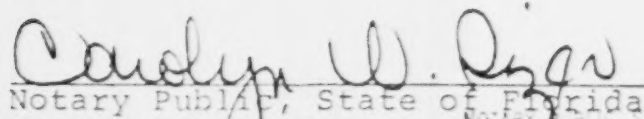
- 3 -

Clerk, Supreme Court of the United
States
One First Street, N.E.
Washington, D.C. 20543

and depositing same in the United States mails
at Jacksonville, Florida, on 20 May 1983.


CARLTON P. MADDUX, Affiant

SWORN to and subscribed
before me this 31st day
of May, 1983.


Notary Public, State of Florida

My Commission Expires:

NOTARY PUBLIC, STATE OF FLORIDA
My Commission Expires Mar. 29, 1987
Bonded By Transamerica Insurance Co.

OCTOBER TERM, 1982

NO. _____

DENNIS ALBERT ROLLINS, JUNIOR
N. ENFINGER, AND JOHN D. THOMAS,

PETITIONERS,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

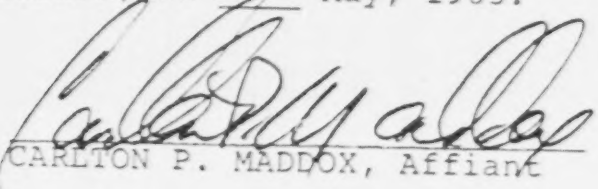
CERTIFICATE OF SERVICE

STATE OF FLORIDA)
COUNTY OF DUVAL)

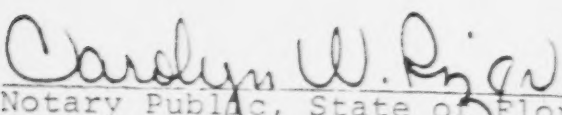
CARLTON P. MADDOX, after being duly sworn, deposes and says that pursuant to Rule 28.2 of this Court he served the within Appendix to the United States Supreme Court on counsel for the Petitioners by enclosing a copy thereof in an envelope, first class postage prepaid, addressed to:

Clerk, Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543

and depositing same in the United States mails
at Jacksonville, Florida, on 31st May, 1983.


CARLTON P. MADDOX, Affiant

SWORN to and subscribed
before me this 31st day
of May, 1983.



Notary Public, State of Florida

My Commission Expires: NOTARY PUBLIC, STATE OF FLORIDA

My Commission Expires Mar. 29, 1987

Bonded By Transamerica Insurance Co.

In the Supreme Court of the United States
OCTOBER TERM, 1983

DENNIS ALBERT ROLLINS, JUNIOR N. ENFINGER AND
JOHN D. THOMAS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
STEPHEN S. TROTT
Assistant Attorney General
PATTY MERKAMP STEMLER
Attorney
Department of Justice
Washington, D.C. 20530
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QUESTION PRESENTED

Whether, having established probable cause to arrest petitioners and to search their airplane and automobile through corroboration of the details of a confidential informant's tip and independent police investigation, the government also should have been required to disclose the name of the police officer who received the tip from the informant so that petitioners could question the officer about the informant's reliability.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-1997

DENNIS ALBERT ROLLINS, JUNIOR N. ENFINGER AND
JOHN D. THOMAS, PETITIONERS

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A15) is reported at 699 F.2d 530. The memorandum opinion and order of the district court (App., *infra*, 1a-16a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 1983, and a petition for rehearing was denied on April 15, 1983 (Pet. App. B1). The petition for a writ of certiorari was filed on May 20, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following denial of petitioners' motion to suppress evidence and a bench trial on stipulated facts in the United States District Court for the Middle District of

Alabama, petitioners were convicted of possession of cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1), and conspiracy, in violation of 21 U.S.C. 846. They were sentenced to concurrent terms of six years' imprisonment to be followed by three years' special parole. The court of appeals affirmed petitioners' convictions.

1. The evidence at the suppression hearing and at trial showed that at 1:00 p.m. on January 26, 1982, Lt. Bradford of the Alabama Department of Public Safety, Bureau of Investigation, Narcotics Department, received a telephone call from an unnamed law enforcement officer. According to the officer, a blue and white Piper Warrior airplane, Tail No. 3036T, was on the ground in Panama City, Florida, and was expected to leave that afternoon for Dothan, Alabama, or some other point in Alabama. The plane was expected to be carrying two occupants, one named Thomas, and a pound of cocaine. The unnamed officer told Lt. Bradford that he had received this tip from a confidential source who had given reliable information in the past. 3/31/82 Tr. 16, 118-120.

Lt. Bradford sought to verify the tip by sending three police officers in a plane to Panama City. Upon their arrival, the officers found the Piper Warrior on the ground, but unoccupied. At approximately 4:30 p.m., petitioners Rollins and Thomas drove up in a Chevy Malibu that was registered to a convicted marijuana trafficker. Carrying a small brown satchel and a paper bag, the two men boarded the plane. 3/31/82 Tr. 16-19, 77, 80.

The officers followed the plane as it flew toward Dothan on an evasive, indirect course. Additional police officers set up ground surveillance at Dothan and watched the plane land. Rollins and Thomas stepped out of the plane and entered an unoccupied Ford LTD that was parked nearby. After a few minutes, petition-

er Enfinger, whom the police recognized as a convicted amphetamine distributor, joined the two men in the Ford. 3/31/82 Tr. 78-81. Fifteen minutes later, Rollins and Thomas returned to the plane and Enfinger drove off in the Ford. As Rollins and Thomas boarded the plane and prepared for flight, they were approached by police officers and asked to deplane. Thomas, appearing nervous, tried to lock the airplane door but dropped the keys (*id.* at 21, 97). After the two men got off the plane, one of the officers crawled up on the wing of the plane to see if anyone else was inside. While the officer was looking through the window of the plane, he saw an open paper bag on the floor behind the back seat. The officer could see that inside the open bag was a plastic bag about the size of a baseball containing white powder. Having previously seen cocaine packaged in this manner, the officer entered the plane and, kneeling on one seat, leaned over to take a closer look at the paper bag and its contents. After satisfying himself that the paper bag contained plastic packages of cocaine, the officer obtained a warrant to search the rest of the plane. Execution of the warrant resulted in the seizure of the paper bag, which was later determined to contain nearly four ounces of 90% pure cocaine and various narcotics paraphernalia. *Id.* at 21-23, 26-28, 62, 86; 4/21/82 Tr. 6-8.

At the same time, other officers were following petitioner Enfinger. They stopped him some distance from the airport, asked him to get out of his car, advised him that he was a suspect in a possible drug transaction, and advised him of his *Miranda* rights. The officers and Enfinger then returned to the airport, where all three petitioners were placed under arrest and advised of their rights. 3/31/82 Tr. 23, 97, 144-145.

A quantity of cocaine was found under the front seat of Enfinger's Ford after the car had been impounded at the county jail. The cocaine was discovered when an of-

ficer was looking for the car's identification number for the purpose of preparing an affidavit for a search warrant application. 3/31/82 Tr. 23, 97, 103-117, 144-145; 4/21/82 Tr. 9-10.

2. Petitioners moved to suppress the evidence seized from the airplane and the car. They also sought disclosure of the name of the police officer who had provided Lt. Bradford with the initial tip that triggered the surveillance and investigation. The government objected to disclosure on the ground that it would lead petitioners to the informant, whose safety would then be jeopardized. 3/31/82 Tr. 120-121. The district court denied both the motion to suppress and the request for disclosure of the unnamed officer (App., *infra*, 1a-16a). The district court found that the informant's tip was amply corroborated by the police officers' surveillance in Florida and Alabama, and that the information gained through the surveillance gave the officers probable cause to arrest petitioners (*id.* at 13a-14a, 15a). The court further ruled that the search of the passenger compartment of the airplane was a lawful search incident to petitioners' arrests.¹ With respect to the Ford, the court held (*id.* at 15a) that "[s]ince the officers could have searched the car when it was stopped, they could have searched it after it was finally delivered to the proper sheriff's office."

¹ At the suppression hearing, conflicting testimony was presented on the question whether the paper bag was open or closed when first noticed by the officer. The district court did not resolve this dispute but reasoned instead that *New York v. Belton*, 453 U.S. 454 (1981), entitled the officer to open any container in the passenger compartment as a search incident to Rollins's and Thomas's arrest. App., *infra*, 15a-16a. The court of appeals, having viewed a video tape of the search of the plane, credited the officer's testimony that the bag was open and the cocaine in plain view when he looked through the window of the airplane (Pet. App. A8 n.1).

In light of the fact that the officers' surveillance corroborated virtually every detail of the informant's tip and thereby established the reliability of the informant, the district court also denied petitioners' motion to discover the name of the officer who had received the tip (App., *infra*, 14a):

Although Lt. Bradford did not personally know the informant and have working knowledge of his reliability in the past, the police are not required to deal only with experienced versus first-time informants. Where as here subsequent observation established that the informant had reliable information, specific experience of the informant's past reliability is not necessary.

3. The court of appeals affirmed, concluding that "the informant's tip was reliable and that there was sufficient corroboration to establish the credibility of the information." Pet. App. A14. Noting that an informant's identity need not be disclosed, the court of appeals held that there was no reason here to reveal the name of the police officer who spoke to the informant (*id.* at A15):

Releasing the name of [the] law enforcement officer who received the tip would serve no purpose other than possibly to lead to the discovery of the informant's identity.

ARGUMENT

Petitioners agree (Pet. 5) that they were not entitled to disclosure of the informant's name for purposes of the suppression hearing. See *McCray v. Illinois*, 386 U.S. 300 (1967). Without citation of any authority, they nevertheless contend (Pet. 6-11) that the identity of the officer who received the tip should have been revealed so that they could examine that officer about the reliability of the informant and the information that he provided. In the circumstances of this case, in which the reliability of the informant was undeniably established through detailed corroboration of the tip and independ-

ent investigation, there was no error in refusing to identify the officer who transmitted the tip to Lt. Bradford.

As petitioners recognize (Pet. 8), the central issue here is whether petitioners' arrests and the ensuing searches of the plane and the car were supported by probable cause. If probable cause was established by the observations of the surveilling officers independent of the informant's tip, then the reliability of the informant was irrelevant to the probable cause determination and petitioners have advanced no ground for disclosure. If, on the other hand, the independent evidence established probable cause only when coupled with the informant's tip, the reliability of the informant is still but one factor—not indispensable—in the overall assessment of probable cause. *Illinois v. Gates*, No. 81-430 (June 8, 1983), slip op. 15-19, 23. And although there are various means of establishing a confidential informant's reliability, including examination of the police officer about the informant's proclivity for giving accurate information, corroboration of the details of the tip has long been recognized as a distinct and legitimate means of proving reliability and veracity. *Id.* at 26-31; *Draper v. United States*, 358 U.S. 307 (1959). As this Court recently reiterated, "[i]t is enough, for purposes of assessing probable cause, that 'corroboration through other sources of information reduced the chances of a reckless or prevaricating tale,' thus providing 'a substantial basis for crediting the hearsay.'" *Gates*, slip op. 29-30, quoting *Jones v. United States*, 362 U.S. 257, 269, 271 (1960).

The totality of the circumstances in this case led to an irrefutable finding of probable cause that would not have been altered even if questioning of the unnamed police officer would have disclosed that the informant was not of proven reliability. Indeed, "[e]ven standing alone," the information obtained by the surveilling offi-

cers "at least suggested that [petitioners] were involved in drug trafficking." *Gates*, slip op. 28. Petitioners Rollins and Thomas arrived at the Panama City airport in a car registered to a known marijuana trafficker. The airplane's indirect route to Dothan, Alabama, indicated that petitioners were attempting to evade surveillance. Furthermore, the brevity of their visit to Dothan, for the sole purpose of meeting with Enfinger, a known narcotics violator, also tended to show that the journey and meeting were drug related.

The informant provided only one piece of information that the officers did not later obtain from their independent observations, namely, that the airplane was expected to contain a pound of cocaine. The officers were entitled to credit this piece of information because every other detail of the tip was fully corroborated by their surveillance. See *Draper*, 358 U.S. at 313. The tail number, model and color of the plane, its initial location and ultimate destination, and the number of occupants were all details provided by the informant and confirmed by independent investigation. Having determined that the informant accurately reported these details, the surveilling officers could assume that he was probably correct in his assertion regarding the presence of cocaine. "Because an informant is right about some things, he is more probably right about other facts." *Gates*, slip op. 29, quoting *Spinelli v. United States*, 393 U.S. 410, 427 (1969) (White, J., concurring).

This strong showing of probable cause would not have been fatally weakened by even the most penetrating cross-examination of the unnamed police officer. The extensive corroboration of the informant's tip alone established his reliability, whether or not the informant had provided accurate tips in the past and whether or not the unnamed officer knew the basis of the informant's knowledge. Hence, there was nothing to be gained from cross-examining the police officer. In these cir-

cumstances there was no reason to endanger the informant by giving petitioners the name of the informant's contact in the police force.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE

Solicitor General

STEPHEN S. TROTT

Assistant Attorney General

PATTY MERKAMP STEMLER

Attorney

OCTOBER 1983

APPENDIX
IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
SOUTHERN DIVISION

CR. NO. 82-12-S

UNITED STATES OF AMERICA

v.

JOHN D. THOMAS; DENNIS ALBERT ROLLINS; and
JUNIOR N. ENFINGER, DEFENDANTS

ORDER

Filed: Apr. 16, 1982

In accordance with the memorandum opinion entered in this cause this date, it is ORDERED that:

1. The motions to suppress filed by defendants Enfinger, Rollins and Thomas are hereby denied.

2. The motions to dismiss the indictment filed by Rollins and Thomas are hereby denied.

3. The motions to sever filed by defendants Thomas and Rollins are hereby denied.

4. The motions filed by the parties relating to disclosure and discovery are denied as moot.

DONE this 16th day of April, 1982.

/s/ Truman Hobbs

TRUMAN HOBBS

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
SOUTHERN DIVISION

CR. NO. 82-12-S

UNITED STATES OF AMERICA

v.

JOHN D. THOMAS; DENNIS ALBERT ROLLINS; and
JUNIOR N. ENFINGER, DEFENDANTS

MEMORANDUM OPINION

This case is now before the Court on the motions of defendants Rollins and Thomas to suppress as evidence all property seized in the search of a Piper Warrior airplane, Tail No. 3036T, on January 26, 1982; the motion of defendant Enfinger to suppress as evidence all property seized in the search of the 1975 Ford LTD automobile on January 26, 1982, and motions by Thomas and Rollins for severance of the trial in this case. A hearing on the specified motions was held March 31, 1982 and briefs were filed on April 13, 1982. Having reviewed the record, the briefs, and the case law in the area of Fourth Amendment search and seizure requirements, the Court is of the opinion that the three motions to suppress are due to be denied. The Court also concludes that the rights of the separate defendants can be adequately safeguarded at trial by proper instructions, and, therefore, the motions to sever will be denied. The motions to dismiss the indictment filed by defendants Thomas and Rollins will be denied.

FACTS

On January 26, 1982, at approximately 1:00 p.m., Lt. Bradford of the Alabama Department of Public Safety, Bureau of Investigation, Narcotics Department, received a call from an unnamed law enforcement officer

who related the information that an airplane, a blue and white Piper Warrior, Tail No. 3036T, was on the ground in Panama City, Florida and was expected to fly to Dothan or some other point in Alabama that afternoon. Flying in the plane would probably be two occupants, one of whom was named Thomas. (There is some confusion in the testimony as to whether the police were informed that the other suspect was named Dennis Rollins.) The plane would have on board about one pound of cocaine. The unnamed officer gave the source of his information as being an informant who had given reliable information in the past.

At about 2:00 p.m. Lt. Bradford then called Officer Rhegness in Montgomery, relaying the informant's tip, and dispatched Officer Rhegness by plane to Panama City to establish surveillance. Officer Rhegness, with accompanying officers Hatfield and Conrad, found the described plane on the ground in Panama City and unoccupied.

Approximately 4:30 p.m. Corporal Hatfield saw two subjects exit a late model Chevy Malibu automobile with an Alabama tag and board the plane, carrying a small brown satchel-type case and a brown paper bag. Corporal Hatfield had the tag number of the car and passed that information to Lt. Bradford in order to try to identify the owner. The officers took off after the observed plane left the ground.

The Piper Warrior first headed north, then turned east, and finally went to a lower altitude and proceeded north again.¹ Officer Rhegness testified that the final heading would take the plane straight to Napier Field, which served Dothan but was located in Dale County, Alabama. According to Rhegness, the plane's flight pattern was evasive in that it failed to hold a straight course or a steady altitude.

While the two planes were flying toward Dothan, Lt. Bradford was notifying the Dothan and Houston Coun-

ty authorities. Officer White of the Dothan Police Department was given the tag number of the Chevy Malibu to determine its registration. The car was registered to All-American Car Rentals which had sold it several months before to J. C. Elmore of Elmore's Car Sales in Dothan. Officer White had been involved in previous narcotic investigations in which J. C. Elmore, Jr. was suspect and knew that J. C. Elmore, Jr. was a convicted marijuana trafficker.

Lt. Bradford also requested Officer White to set up ground surveillance at Napier Field. Three cars proceeded to the airport. One car contained Officer White and Agent David Dukes of the ABI; the second car held Sgt. Sorrells of the Dothan police, Officer Saloom of the Alabama Department of Forensic Sciences, and Leroy Wood of the Houston County Sheriff's office; and the third car held Roger Jones of the ABC Board and Joe Watson. The cars were in place when the planes arrived, and the cars and ABI plane were in radio contact with each other.

The Piper Warrior landed and taxied to a stop about fifty yards from where Officer White and Agent Dukes were stopped. Officer White saw the two suspects leave the plane and go to an unoccupied 1975 Ford LTD two-door automobile and get inside. A few minutes later a man that Officer White recognized as Junior Enfinger walked from the office building to the car and got inside. Officer White knew that Mr. Enfinger had been convicted for distributing amphetamines in 1975 or 1976.

The three stayed in the car for approximately fifteen minutes. Then the two men from the airplane returned to the plane. As soon as they left the car, Enfinger drove away. The police car containing Officers Sorrells, Saloom and Wood followed. The other two suspects boarded the plane and began preparation for flight. At this point Officer Rhegness, Corporal Hatfield, and

Dave Conrad approached the suspects' plane, identified themselves, and asked the two to get out. The suspects exited the plane. Defendant Thomas dropped the keys as he was trying to lock the airplane door and, according to the officers "appeared nervous." The suspects were asked to get off the wings and to show their identification. They were then placed on the ground with their hands behind their heads.

At about this time Officer White and Agent Dukes arrived at the plane, and Officer Rhegness crawled up on the wing to see if there were any other suspects in the plane. Although the information received and the observation up to this point did not indicate that anyone else was on board, the officers testified that it is standard procedure in a narcotics case to check the area and be sure that no one else is present. According to Officer Rhegness, while he was looking through the window at the interior of the plane, he saw an open paper bag inside another open paper bag on the floor behind the back seat. In the bag Rhegness could see a plastic bag about the size of a baseball containing a white powder. Officer Rhegness testified that previously he had seen cocaine packaged in this manner. At this point he entered the plane and, kneeling on one seat, leaned over and took a closer look at the paper bag and its contents, satisfying himself that the paper bag contained plastic packages of cocaine.

Defendants testified that the large paper bag which contained the smaller bag had been closed and rolled down from the top when placed in the plane. Defendants also testified that they never opened the sack after leaving Panama City. As discussed, *infra*, they contend that Officer Rhegness could not have seen the plastic bag containing white powder until he entered the plane and opened the paper bag behind the pilot's seat.

While the above was occurring, Officer Sorrells, Saloom and Wood were following Enfinger. They

stopped him some distance from the airport. Saloom testified that as they stopped Enfinger he appeared to be reaching under the seat below him. The officers asked Enfinger to exit the vehicle, advised him that he was a suspect in a possible drug transaction, and advised him of his *Miranda* rights. Officer Saloom then got into the car with Enfinger for Enfinger to drive the car back to the airport. The police car followed. At the airport this car was locked and Enfinger was walked to the plane. By this time Officer Rhegness had locked the plane, placed a guard and returned to the suspects. Officer Rhegness placed all three defendants under arrest, read them their rights, and transported them first to a jail in Dothan and later to the Dale County jail.

Officer Rhegness then proceeded to get a warrant to search the rest of the plane. The affidavit of Officer Rhegness for the warrant reads:

"I have, with my own eyes seen cocaine, a controlled substance, in a plastic bag contained in a paper bag in a Piper Warrior aircraft, white in color with blue stripes, Identification Number N 3036T, within the past two (2) hours."

The affidavit also identifies the possessor and location of the airplane. Defendant Thomas was returned to the airport, and served with the warrant by Deputy Grant of the Dale County Sheriff's Department at approximately 9:50 p.m. The items sought to be suppressed were then catalogued and the powder was later identified as containing cocaine. The search was recorded on video tape by a television news crew from a local station, Channel 4, in Dothan. Defendants presented the film as evidence at the hearing.

Enfinger's car was driven by Mr. Saloom to the Dothan Police Department, locked and the keys given to Officer Sorrells. Later Officer White drove the car from Dothan to the Dale County Sheriff's office where it was locked and parked in front of the jail so that the

jailer could watch. Neither Saloom nor White reported seeing or looking for anything in the car.

At the Dale County jail Deputy Grant checked the car to determine its vehicle identification number for the purpose of preparing the warrant affidavit. Deputy Grant testified that as he shone his flashlight into the car, he saw a clear package containing a white substance on the floorboard. It was pushed partly but not completely under the front seat. Deputy Grant testified that he had worked in other narcotic investigations involving cocaine and concluded that the package he saw probably contained the drug. Grant filed an affidavit for a warrant for the car which, after identifying the vehicle, stated:

"I have seen, within the past hour, a plastic bag containing a white substance which appears to be cocaine, under the front seat of this vehicle. Junior Enfinger is now under arrest for a narcotics violation involving cocaine, along with two (2) other individuals, and was arrested while in possession of this vehicle. I have personal knowledge that Junior Enfinger has been arrested and convicted in the past for narcotics violations."

A warrant was issued and the car was searched about 11:20 p.m. The search uncovered two plastic bags containing white powder located beneath the front seat, which has been identified as cocaine.

DISCUSSION OF LAW

Both search warrants in this case were issued on the basis of the affiant officers' personal knowledge and viewing of a substance which appeared to be cocaine. Although other operative facts are contained in the affidavits, they are not, standing alone, sufficient for a finding of probable cause for issuance of the warrants. The validity of the warrants turns on the validity of the means by which the officers obtained their information. But if a warrantless search of the car and plane was

valid and revealed the objects sought to be suppressed, then whether or not a valid warrant was later obtained is irrelevant.

The evidence at the motion to suppress hearing would bear out the worst fears of those who oppose the claimed sweep of the Fourth Amendment exclusionary rule. Basically, the conflict in the testimony at the hearing was whether a paper bag was partially rolled at the top or was open sufficiently for the arresting officer to see what he claimed, i.e., that the bag contained cocaine. In *United States v. Williams*, 622 F.2d 830 (5th Cir. 1980), *cert. den.* 449 U.S. 1127, the Fifth Circuit in an *en banc* decision held that if the arresting officers acted "in good faith," the evidence should not be suppressed.

Without any question, the officer making the instant arrest reasonably believed that the search and seizure of the bag was proper. The Court after laboriously studying the latest cases from the Supreme Court of the United States and the Court of Appeals has reached the same conclusion. But as an intellectual exercise, the law on this subject rivals the most difficult problems which confront our courts. Surely courts should adopt a rule which is easier to follow for law enforcement officers who must make decisions in the field under trying circumstances. The result of an error in this confusing field of law in most cases is that the guilty go free. If the offense is trafficking in drugs, experience teaches that they go free to continue to practice their profitable and vicious business. The opinion of the *en banc* court in *Williams*, which may or may not be the law after *Robbins v. California*, ____ U.S. ____, 49 L.W. 4906 (July 1, 1981), and *New York v. Belton*, ____ U.S. ____, 49 L.W. 4915 (July 1, 1981), discussed later in this opinion, would make a decision in this case simple. This Court has not based its decision on

Williams, however, because of doubts as to its being controlling after *Robbins* and *Belton*.

In the opinion of this Court, the searches in this case were entirely reasonable and in no way violated the command of the Constitution which forbids "unreasonable searches and seizures." When the instant searches are "judged in accordance with 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act,' *Brinegar v. United States*, 338 U.S. 160, 175 (1949), the arrest and subsequent search were reasonable and valid under the Fourth Amendment." *Hill v. California*, 401 U.S. 797 (1970).

It would appear to this Court that the values sought to be preserved by the Fourth Amendment and the exclusionary rule when limited to the rule's proper role are too important to risk the growing public disenchantment with, and hostility to, a rule that in its swollen, claimed scope is baffling, frustrating and unworkable and seems to serve no purpose than to defeat legitimate, reasonable law enforcement efforts.

Considering the validity of the search in this case without regard to the rule of *Williams*, that the exclusion rule does not come into play when the officers have acted in good faith, the Court notes that there are two applicable exceptions to the warrant requirement of the Fourth Amendment; i.e., the "automobile exception" and the "search incident to arrest" exception.¹ These exceptions are distinct and different in scope although the line is often blurred by the fact that a search incident to an arrest often involves an automobile and its

¹ Because the Court is of the opinion that these two exceptions provide adequate ground for supporting the validity of the searches in question, this opinion will not discuss or decide whether the searches were also justified under the "plain view" exception, *Coolidge v. New Hampshire*, 403 U.S. 443, 464-472 (1970).

interior. The Court has concluded that defendant Enfinger's car is covered by the automobile exception and the search of the plane is justified as a search incident to an arrest.

Beginning with the decision in *Carroll v. United States*, 267 U.S. 560 (1924), the Supreme Court has defined an exception to the Fourth Amendment for automobile searches. The legality of a warrantless automobile search is based on the existence of probable cause to believe that the automobile is carrying contraband subject to forfeiture under the law, and the difficulties of securing a moveable vehicle while a warrant is obtained. It is the suspected contraband on which this analysis focuses and for which this type of warrantless search and seizure is allowed. *Carroll v. United States*, 267 U.S. 560 (1924). The Court has interpreted its *Carroll* decision to mean that an automobile may be stopped and contemporaneously searched where probable cause coupled with exigent circumstances exist. *Coolidge v. New Hampshire*, 403 U.S. 443, 458-464, reh. den. 404 U.S. 874 (1970). Exigent circumstances include those which indicate that the automobile cannot be adequately secured during the time necessary to obtain a warrant. See *United States v. Kreimes*, 649 F.2d 1185, 1192-93 (5th Cir. 1981). Moreover, if both the *Carroll* requirements are met at the time the automobile is stopped, the police may, alternatively to a contemporaneous search, seize the car, return it to the police headquarters and search it there. *Chambers v. Maroney*, 399 U.S. 42, 51-52 (1969); *Coolidge v. New Hampshire*, 403 U.S. at 458.

The scope of the search is limited, however, to that which can be seen by searching the passenger section and opening the trunk. The Supreme Court had previously held that luggage could not be opened because of the expectation that objects deposited in a closed suitcase will remain private and also for the reason that

luggage can be seized and controlled while a warrant is sought. *Arkansas v. Sanders*, 442 U.S. 753 (1978). This past term in *Robbins v. State of California*, ____ U.S. ____, 49 L.W. 4906 (July 1, 1981), a plurality of the Court held that the automobile exception did not extend to permit the warrantless search of any type of closed opaque container within the automobile.²

Although raised in dictum in prior decisions, the validity of the search incident to an arrest exception was expressly recognized by the Supreme Court in *Chimel v. California*, 395 U.S. 752 (1969), when it held "that a lawful custodial arrest creates a situation which justifies the contemporaneous search without a warrant of the person arrested and of the immediately surrounding area." *New York v. Belton*, ____ U.S. ____, 49 L.W. 4915 (July 1, 1981). The justification for this exception is the need of the police officer to protect himself by assuring that the prisoner does not have access to a weapon and the need to prevent evidence from being concealed, removed, or destroyed. 395 U.S. at 763. *New York v. Belton*, *supra*, a majority of the Court held that the passenger compartment of an automobile may be searched, any containers opened, and their contents examined pursuant to and contemporaneous with the lawful custodial arrest of the automobile's occupant. 49 L.W. at 4916. This search may be made after the arrested occupants have been removed from the automobile.

² The *Robbins* case may be reconsidered when the Supreme Court decides the case of *United States v. Ross*, No. 80-2209, argued March 1, 1982, 50 L.W. 3707 (March 9, 1982). *Ross* involves the search of a paper bag found in defendant's car trunk. Moreover, there was not a majority in *Robbins* who were of the view that the container could not have been legally searched if the container had been in the interior of the car rather than in a locked trunk.

The instant case, however, involves not only an automobile but an airplane. In *United States v. Olson*, an unpublished opinion of the Eleventh Circuit, No. 81-7148, Feb. 19, 1982, the court held that the "automobile exception" applied to airplanes. The Eleventh Circuit did not reach the question of whether the search incident to arrest cases involving automobiles applied to an airplane. However, this Court can see no reason why the passenger compartment of a small airplane should be treated in a different manner than the passenger compartment of an automobile when it is searched contemporaneously with the lawful arrest of its occupants.

Both "the automobile" and "search incident to an arrest" exceptions are based on the existence of probable cause to believe that a crime is or has been committed. In the automobile exception, it is probable cause that the vehicle contains contraband; in the search incident to arrest, it is that the occupant has violated or is violating the law. The facts are judged on the basis of whether a reasonably prudent man of the officer's experience and training, looking at the "totality of the circumstances and the inferences" therefrom, would conclude that there is probable cause to believe that the vehicle or the individual is involved in violating the law. *United States v. Ballard*, 600 F.2d 1115, 1119 (5th Cir. 1979). See also *Whiteley v. Warden*, 401 U.S. 560, 566-569 (1970). (Warrantless arrest—same standard applicable to officer as to magistrate.) Information received from an informant can be used as the basis for a finding of probable cause. In the case of *United States v. Squella-Avendano*, 447 F.2d 575 (5th Cir.) cert. den. 404 U.S. 985 (1971), the court summarized the Supreme Court's analysis of the use of informant testimony in the leading cases of *Aquilar v. United States*, 378 U.S. 108 (1964) and *Spinelli v. United States*, 393 U.S. 410

(1969). The informant's tip must undergo the following graduated analysis:

First, if the information provided is in such "detail" and "minute particularity" that "a magistrate, when confronted with such detail, could reasonably infer that the informant had gained his information in a reliable way," then the report, if sufficiently incriminating, may, without more, be grounds for finding probable cause. *Secondly, less detailed information from a reliable source may be used as grounds for a finding of probable cause if independent investigation by law enforcement agencies yields sufficient verification or corroboration of the informant's report to make it "apparent that the informant had not been fabricating his report out of whole cloth."* Corroboration must render the report "of the sort which in common experience may be recognized as having been obtained in a reliable way. Thirdly, even a report that is not under the above two standards sufficient of itself to establish probable cause may count in the magistrate's determination of probable cause, but only as one of a number of other factors of "further support" tending to show probable cause. Examples of satisfactory "further support" given in *Spinelli* involved law enforcement agencies' knowledge of independent facts which suggest criminal conduct or of facts which taken on an aura of suspicion in light of the informant's tip. (emphasis added) 447 F.2d at 580.

See also *United States v. Tuley*, 546 F.2d 1264, 1267 (5th Cir.) cert. den 431 U.S. 930 (1977). Both the second and third phase of this analysis are applicable to the facts of this case. Lt. Bradford was given the information by a source, another officer, whom he knew and had worked with before and this source relayed that his informant had been reliable in the past. The officer did not give any facts indicating how his informant obtained the information. The officers instigated surveillance and

everything observed, such as the identity of the plane, the identity of defendant Thomas, the erratic flight pattern of the plane, and its landing at one of the suspected destinations, confirmed that the informant's information was reliable. Moreover, the officers gathered further independent information which suggested that the information that the suspected individuals were transporting contraband narcotics was true. They identified the car which delivered defendants Thomas and Rollins to the airport as belonging to an individual with a prior drug conviction. Moreover, at Napier Field the two men in the plane met with another man known to have a prior drug conviction. They appeared to have landed only for the purpose of meeting with this man for fifteen minutes. The totality of the circumstances is compelling that the informant's information as to the cocaine was as reliable as the rest of his information and that there was probable cause to believe that some form of drug trafficking was occurring. Since there was probable cause to believe that the airplane contained contraband and its occupants were engaged in trafficking in contraband, there was probable cause to believe that some or all of that contraband had been transferred to defendant Enfinger's car, otherwise why the trip to Napier Field?

Although Lt. Bradford did not personally know the informant and have working knowledge of his reliability in the past, the police are not required to deal only with experienced versus first-time informants. Where as here subsequent observation established that the informant had reliable information, specific experience of the informant's past reliability is not necessary. 447 F.2d at 582.

The conclusion that the officers had probable cause for believing that defendants were trafficking in drugs provides the basis for applying the above discussed exceptions to the warrant requirement. When defendant

Enfinger's car was stopped, the officers had probable cause to believe it contained contraband and the exigent circumstances justified a search. The car was going to have to be moved several times before it could be secured, they were going to have to allow defendant to re-enter the car, and an officer was going to have to enter the car. Since the officers could have searched the car when it was stopped, they could have searched it after it was finally delivered to the proper sheriff's office. Thus it is irrelevant whether Officer Grant saw the clear plastic package of powder through the car window or by looking inside the car, although the Court finds his testimony credible that he did observe what appeared to be cocaine while attempting to obtain the car's identification vehicle number.

As to the airplane, there was probable cause to arrest the defendants and to search the passenger area of the plane from which the defendants had just exited. The police would be derelict in their responsibility if they did not verify that there was no one left in the plane and no accessible weapons or easily destroyed evidence left in the passenger compartment. This is particularly true when the airplane must be left at a public airport while the officers locate a judge or magistrate. See *United States v. Kreimes*, 649 F.2d at 1193 n.7 and text. Moreover, at the time Officer Rhegness entered the plane, he did not know if the third suspect had been apprehended, or if there was anyone else in the vicinity of the airport that had a connection with the suspects and their activities. The purpose of the incident to arrest exception is to allow discovery and preservation of destructible evidence as well as to allow the police to protect themselves. *United States v. McFarland*, 633 F.2d 427, 429 (5th Cir. 1980).

Finally, under the holding of *New York v. Belton*, if Officer Rhegness could search the passenger compartment incident to an arrest, he could open any closed

container and examine its contents. The lawfulness of the discovery of the cocaine in the paper bag does not depend on whether Officer Rhegness viewed the contents from outside the plane or only after entering the passenger area and opening the bag. Although the "plain view" exception may also be applicable, there is no need to address that issue where the search was lawful incident to the arrest.³

Defendants also contend that the warrants are invalid because of failure to comply with the Federal Rules of Criminal Procedure, Rule 41 requirements for searches at night. A state court judge and state police officers are not required to comply with the federal rules of procedure. The warrants are not invalid on this ground, and a violation of this rule would not compel suppression of the evidence.

For the above stated reasons, the Court will deny defendants' motions to suppress. The Court will also deny defendants' oral motion to discover the name of the officer who gave Lt. Bradford the information. An order will be entered in accordance with this opinion this date.

DONE this 16th day of April, 1982.

/s/ Truman Hobbs

TRUMAN HOBBS

United States District Judge

³ As indicated, the Fifth Circuit has held that the "automobile exception" applies to an airplane. Reading the various opinions in *Robbins*, it seems logical that a majority of the *Robbins* court would, relying on the expectation of privacy analysis of Justice Powell, uphold the search in this case, which involved only a paper bag in the interior of the plane, under the automobile exception.